

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

JERRY WALKER,)	
Charging Party/ Appellant)	Case No. 788-2011
)	HRB Case No. 0101014335
vs.)	
)	
LOVELAND PRODUCTS, INC.)	ORDER FOR REMAND
f/k/a TRANSBAS)	
Respondent.)	

Charging Party, Jerry Walker (Walker), filed a complaint with the Department of Labor and Industry (Department), alleging discrimination in employment on the basis of disability. The case went before the Department's Hearings Bureau, wherein the hearing officer granted summary judgment to the employer, Loveland Products, Inc. f/k/a Transbas (LPI) and dismissed the case on the grounds that Walker had filed an untimely complaint. The hearing officer issued a Decision Granting Summary Judgment to LPI and Dismissing the Case on July 1, 2011.

Walker timely filed an appeal with the Montana Human Rights Commission (Commission). The Commission considered the matter on September 14, 2011. Patricia Peterman, attorney, appeared and presented oral argument on behalf of Walker. William Mattix, attorney, appeared and presented oral argument on behalf of LPI.

After careful consideration of the complete record and the argument presented by the parties, the majority of the Commission determines that the hearing officer was incorrect as a matter of law to grant summary judgment to the Respondent on the basis that Walker's human rights complaint was untimely. Therefore, the Commission reverses the hearing officer's Decision and remands this case to the Hearings Bureau for a hearing on the merits.

FACTUAL BACKGROUND

LPI hired Walker as a packager in 2003. By 2005, LPI promoted Walker to the position of Lead Packager, which required Walker to keep inventory, supervise assembly line workers,

clean out packaging lines, drive a forklift and monitor worker safety. In April 2006, Walker injured his back and requested the accommodations of a 20-pound lifting restriction and no repetitive bending, twisting or lifting. LPI accommodated Walker's restrictions and Walker returned to work with no alteration to his job duties.

In April 2008, Walker again injured his back and was off work for five months. On September 22, 2008, Walker submitted a doctor's note to LPI, which stated that Walker was medically approved to return to work on September 23, 2008, with the accommodations of a 20-pound lifting restriction, no lifting above the shoulders, and no twisting, squatting or working on his knees. Although the identified restrictions required accommodations similar to those instituted by the employer in April 2006, LPI informed Walker on September 29, 2008, that the company would be "unable to accommodate the restrictions set by your physician because the restrictions remove essential functions of the job." LPI did not identify the specific essential functions that LPI determined Walker to be unable to perform. Walker continued on disability leave for the next year, with virtually no communication occurring between the employer and Walker.

During the fall of 2009 and without prior notice or explanation, LPI mailed a document to Walker titled "Notice of Resignation, Release and Covenant Not to Sue." By signing the document, Walker would voluntarily resign from his employment with LPI; admit that he could not perform his job with or without reasonable accommodations; acknowledge that returning to work would expose him to re-injury or aggravation of his condition; and agree to release LPI from any and all liability. Walker refused to sign. Instead, Walker telephoned LPI on October 29, 2009, for the purpose of finding out if he still had a job. Walker engaged a series of three corporate officers in conversation about his work status. Walker first spoke with Billings plant manager Lee Schwalenberg, who informed Walker that he did not have a job and referred

Walker to the human resources office. Next, Walker spoke with Holly Amundsen, the company's human resource officer in Billings. Amundsen noted that Walker was listed on company records as terminated, but acknowledged she had received no paperwork on Walker's termination. Finally, Walker called Ale De La Fuente, the corporate human resource manager in Loveland, Colorado. De La Fuente explained to Walker that "termination status" was a term of art and did not mean that Walker had been fired.

Walker filed his human rights complaint on April 6, 2010, alleging that LPI discriminated against him by refusing to accommodate his disability in violation of the Montana Human Rights Act and the Americans with Disabilities Act (ADA). Walker further alleged that LPI informed him on or about October 29, 2009, that he no longer had a job with the company.

STANDARD OF REVIEW

The Human Rights Commission conducts *de novo* review of a hearing officer's decision to grant of summary judgment. In determining whether there are any genuine issues of material fact, the Commission must view the evidence in the light most favorable to the nonmoving party. *Barnett v. U.S. Air*, 228 F.3d 1105, 1109 (9th Cir. 2000), vacated on other grounds by 535 U.S. 391, 122 S.Ct. 1516 (2002).

DISCUSSION

The only issue before the Commission is whether the hearing officer was correct as a matter of law to grant summary judgment to LPI and dismiss Walker's human rights complaint as time-barred.

A complaint alleging a violation of the Montana Human Rights Act must be filed with the Human Rights Bureau within 180 days after the alleged unlawful discriminatory practice occurred or was discovered. *Mont. Code Ann. § 49-2-501(4)*. If the Department determines that the complaint is untimely, it shall dismiss the complaint on a finding of no reasonable cause.

Mont. Code Ann. § 49-2-501(5). Walker filed his human rights complaint on April 6, 2010, alleging discrimination in employment on the basis of disability (degenerative disc and chronic back pain). Therefore, the 180-day period of limitation for Walker's claim reaches back to October 8, 2009.

In argument before the Commission, Walker asserted that his complaint was timely because it was filed within 180 days of Walker's discovery on October 29, 2009, that LPI had placed him on "termination status," which Walker understood to mean he no longer had a job with LPI. Walker further argued that the employer's failure to engage in the interactive process to determine a reasonable accommodation that would allow Walker to return to work constituted a continuing violation of the Montana Human Rights Act. Walker maintained that the employer's continuing violation persisted through October 2009, as LPI continued to ignore its obligation to engage in the interactive process in good faith when Walker contacted the company to determine his job status.

LPI argued that the last adverse action that had the potential to substantiate a discrimination claim by Walker occurred on September 29, 2008, when the company denied Walker's request for an accommodation for his disability. LPI stated that because Walker had failed to re-assert his request for any accommodation within the 180-day period preceding the filing of his human rights complaint, the hearing officer was correct to conclude the complaint was untimely.

Discrimination on the basis of a physical disability includes the employer's failure to make reasonable accommodations that are required by an otherwise qualified person who has a disability. *Mont. Code Ann. § 49-2-101(19)(b)*. An accommodation to a person with a physical disability for the purpose of enabling the person to perform the essential functions of an employment position is reasonable unless it would impose an undue hardship upon the employer.

Admin Rule Mont. 24.9.606(4). An employment practice that segregates or classifies a disabled person in a way that adversely affects the individual's employment status or opportunities may constitute discrimination. *Admin. Rule Mont. 24.9.604(3)(d)*.

Employers have a mandatory obligation to engage in an "interactive process" with disabled employees to identify and implement appropriate reasonable accommodations. *Barnett*, 228 F.3d at 1114; *McDonald v. Dept. of Env'tl. Quality*, 2009 MT 209, ¶ 80, 351 Mont. 243, ¶ 80, 214 P.3d. 749, ¶ 80 (*J.Cotter, concurring*). The interactive process is triggered by the employee's request for an accommodation or the employer's recognition of the need for one. *Barnett*, 228 F.3d at 1114. The process for determining a reasonable accommodation for an employee's disability requires communication and good-faith exploration of possible accommodations between the employer and employee. *Barnett*, 228 F.3d at 1114. Both sides must communicate directly, exchange essential information and neither side can delay or obstruct the process. *Barnett*, 228 F.3d at 1114-5.

The duty to accommodate a disabled employee is a continuing duty, which is not exhausted by one effort. *McDonald*, ¶ 80 (citing *Humphrey v. Memorial Hospitals*, 239 F.3d 1128, 1138 (9th Cir. 2001)). The interactive process is the key mechanism for facilitating the integration of disabled employees into the workplace. *Barnett*, 228 F.3d at 1116. A party that fails to communicate, obstructs or delays the interactive process is not acting in good faith. *Barnett*, 228 F.3d at 1115 (citation omitted). An employer who rejects this core process and fails to engage in good faith faces liability for the remedies imposed by law if a reasonable accommodation would have been possible. *Barnett*, 228 F.3d at 1115. Further, an employer cannot prevail at the summary judgment stage if there is a genuine dispute as to whether the employer engaged in good faith in the interactive process. *Barnett*, 228 F.3d at 1115.

The hearing officer stated: "There is no evidence in this record creating a genuine issue of material fact as to whether LPI ever made [a] decision, took an action, or refused to take an action about Walker's employment status after September 29, 2008." *Decision*, p. 3. The Commission disagrees.

The record on review before the Commission indicates that LPI sought Walker's signature on a proposed agreement for "Resignation, Release and Covenant Not to Sue." Walker refused to sign, contacted three management level LPI employees by telephone on October 29, 2009, and inquired about his employment status. Two LPI managers told Walker he no longer had a job with the company and that LPI had placed him on "termination status." LPI's human resource officer Ale De La Fuente learned that Walker would not resign and clarified for Walker that he remained an LPI employee. Due to the conversation that occurred between De La Fuentes and Walker, coupled with LPI's letter requesting Walker's resignation, the Commission finds that a genuine issue of material fact is raised regarding the timeliness of the filing of Walker's human rights complaint.

LPI personnel were aware that Walker had a disability and that Walker was able and willing to work if the employer could accommodate the restrictions imposed by Walker's treating physician. None of these corporate officers opened a discussion regarding Walker's condition, work restrictions, or return to work on October 29, 2011. When viewed in the light most favorable to Walker, it is possible Walker believed on that date that he was still employed and, therefore, still had the right to engage in the interactive process.

Because the Commission finds the acts of LPI personnel raise genuine issues of material fact regarding LPI's potential liability under the Montana Human Rights Act, the Commission determines that the hearing officer incorrectly granted summary judgment. Only a hearing on the merits can resolve the factual dispute over whether Walker filed his complaint within 180

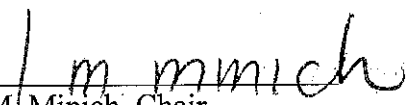
days of a discriminatory act committed by the employer. Therefore, the Commission reverses the hearing officer's grant of summary judgment in favor of LPI and remands this case for an administrative hearing.

The Commission has considered the evidence in the light most favorable to Walker because the hearing officer granted LPI's motion for summary judgment. Therefore, the Commission reserves the resolution of all factual issues to the Hearings Bureau.

ORDER

IT IS HEREBY ORDERED, that the Hearing Officer Decision Granting Summary Judgment to LPI and Dismissing the Case is REVERSED and the case is REMANDED to the Hearings Bureau for further proceedings.

DATED this 18th day of October 2011.

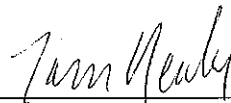

L.M. Minich, Chair
Human Rights Commission

CERTIFICATE OF SERVICE

The undersigned secretary for the Human Rights Commission certifies that a true and correct copy of the foregoing ORDER TO REMAND was mailed to the following by U.S. Mail, postage prepaid, on this 18th day of October 2011.

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